

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

JERYLAN MARQUEZ-ORTIZ,

Defendant.

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18-CR-336 (WHP)

MEMORANDUM & ORDER

WILLIAM H. PAULEY III, Senior United States District Judge:

Defendant Jerylan Marquez-Ortiz moves for early disclosure of 3500 material, discovery pursuant to Brady, and dismissal of the indictment.¹ For the following reasons, Marquez-Ortiz's motion is denied.

BACKGROUND

The defendant, along with co-defendants Miguel Rivera and Jose Benedicto Ulloa Brito a/k/a Christopher Ayala, planned to rob approximately 10-15 kilograms of cocaine from a drug stash house in the Bronx. Mr. Marquez-Ortiz's co-defendants each brought a firearm to the meeting, just prior to the planned robbery. But this was a "reverse sting" set up by the Drug Enforcement Administration ("DEA") and there were no drugs at the stash house. The DEA arrested all three defendants.

On May 11, 2018, Mr. Marquez-Ortiz was indicted on four counts: Hobbs Act robbery conspiracy, attempted Hobbs Act robbery, conspiracy to possess with intent to distribute cocaine, and aiding and abetting the possession of a firearm in furtherance of the attempted

¹ The defendant also moved for suppression of a post-arrest statement, but that portion of the motion has been withdrawn by defense counsel. (ECF No. 66.) In addition, the defendant moved for production of 404(b) evidence, that application is moot because the Government already provided that evidence.

Hobbs Act robbery and narcotics conspiracy. (ECF No. 10.)

1. Early Disclosure of 3500 Material and Brady Material

Marquez-Ortiz moves for early disclosure of 3500 Material along with immediate disclosure of any Brady material.

The Jencks Act provides that “[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement” 18 U.S.C. § 3500(b). It “is not a general discovery device.” United States v. Wallace, 2016 WL 4367961, at *12 (S.D.N.Y. Aug. 11, 2016). And the Second Circuit has “previously held that [the] Jencks Act prohibits a District Court from ordering the pretrial disclosure of witness statements.” United States v. Coppa, 267 F.3d 132, 145 (2d Cir. 2001). Other judges in this District have repeatedly held that the Jencks Act deprives district courts the power to mandate early production. See United States v. Giffen, 379 F. Supp. 2d 337, 348 (S.D.N.Y. 2004) (“With respect to any statements by Government witnesses, the Jencks Act, 18 U.S.C. § 3500, prohibits a district court from ordering pretrial disclosure of witness statements before their direct testimony at trial.”). This is because “[t]he plain meaning of [the Jencks Act] does not require production of 3500 material before trial. In practice, however, courts in this district require the government to produce 3500 material at least the Friday prior to the commencement of trial and sometimes earlier.” Wallace, 2016 WL 4367961, at *12. And that amount of “notice is sufficient under the applicable law.” United States v. Romain, 2014 WL 1410251, at *3 (S.D.N.Y. Apr. 11, 2014).

“Only where the complexity of the case is exceptional and the amount of evidentiary materials it produces is extremely voluminous may the Court order the Government to disclose [impeachment] materials well in advance of trial.” United States v. Canter, 338 F.

Supp. 2d 460, 462 (S.D.N.Y. 2004). This is not such a case. The Government has indicated it will turn over 3500 material one week prior to trial. That is sufficient.

Further, the Government is reminded of its ongoing Brady obligations. This Court has no basis to believe that the Government has not satisfied and will not continue to fulfill its Brady obligations.

2. Dismissal of the Indictment or Additional Discovery

Marquez-Ortiz seeks dismissal of the indictment based on a claim of selective enforcement and to compel extensive discovery regarding reverse stings. To succeed on a claim of selective enforcement, a defendant must show that the Government declined to prosecute similarly situated suspects of other races. See United States v. Armstrong, 517 U.S. 456, 456 (1996). A defendant must put forth some evidence tending to show the existence of both discriminatory effect and discriminatory intent. Armstrong, 517 U.S. at 468.

An indictment may be dismissed if the Government's actions are found to be so excessive they violated due process. See United States v. Al Kassar, 660 F.3d 108, 121 (2d Cir. 2011). The Second Circuit has held that a claim of outrageous government conduct is one that is frequently raised but seldom succeeds. See United States v. Schmidt, 105 F.3d 82, 91 (2d Cir. 1997). A sting is not sufficient to show that the Government exceeded due process limits. See United States v. Cromitie, 727 F.3d 194, 219 (2d Cir. 2013).

Judges routinely reject historical data like that submitted by Marquez-Ortiz in support of his motion. United States v. Garcia-Pena, 2018 WL 6985220, at *4 (S.D.N.Y. Dec. 19, 2018) (collecting cases). Marquez-Ortiz utilizing the same exhibits that were submitted in Garcia-Pena, cites to thirty-three reverse stings involving 144 arrests and asserts that 143 defendants were "visible minorities." (Defendant's Motion, ECF No. 46, Page 6, ¶ A.)

Marquez-Ortiz also offers the same census data that was submitted in Garcia-Pena.

In rejecting this statistical data, the Garcia-Pena court held: “Even if statistics could provide evidence of discriminatory effect, Armstrong also requires proof of discriminatory intent.” Garcia-Pena, 2018 WL 6985220, at *6. This Court agrees.

Marquez-Ortiz also cites a Ninth Circuit opinion that ordered additional discovery following an appeal. United States v. Sellers, 908 F.3d 848 (9th Cir. 2018). Addressing Sellers in a footnote, Garcia-Pena observed that the defendant “has offered nothing more than ‘mere speculation’ as to the discriminatory intent of the officers in his case, and, as such, also fails to meet the discovery standard articulated in Sellers.” Garcia-Pena, 2018 WL 6985220, at *4 n.5. The same is true here.

The cooperator in this case contacted Marquez-Ortiz. Marquez-Ortiz then brought Ayala into the conspiracy. (Complaint, ECF No. 1 (“Compl.”), ¶ 5(c)). The record is not clear who reached out to Rivera. The DEA used a cooperator who knew Marquez-Ortiz and spoke with him about robbing a drug dealer. (Compl. ¶ 5(a)). The discussions continued for almost a year before Marquez-Ortiz put Ayala into contact with the cooperator. (Compl. ¶ 5(c)). The cooperator, together with a second cooperator, Ayala and Marquez-Ortiz then met in person on May 2, 2018 to commit the robbery, along with Rivera. (Compl. ¶ 5).

The DEA knew the cooperator. The cooperator knew Marquez-Ortiz. Marquez-Ortiz knew Ayala and possibly Rivera. Without the assistance of Marquez-Ortiz, the cooperator would never have met Ayala or Rivera. The Government cannot control who the cooperator knew and who among those people might then agree to participate in robbing a drug dealer. It is ironic that Marquez-Ortiz, who was responsible for bringing at least one other individual into the conspiracy, would claim that he was unfairly targeted by law enforcement.

Statistics alone cannot carry Marquez-Ortiz's burden. Even if this Court assumed that the reverse sting statistics were sufficient to show discriminatory purpose, they still fail to show discriminatory intent. A defendant "must prove that the decision makers in his case acted with discriminatory purpose." McClesky v. Kemp, 481 U.S. 279, 292 (1987) (emphasis in original). And, at best, the DEA may be able to control the first point of contact a cooperator makes, but subsequent contacts by those individuals are largely out of the DEA's control.

In sum, the reverse sting in this case is not outrageous conduct that warrants dismissal of the indictment and Marquez-Ortiz's motion is denied in all respects.

CONCLUSION

For the foregoing reasons, Marquez-Ortiz's motion is denied. The Clerk of Court is directed to terminate the motion pending at ECF No. 46.

Dated: September 4, 2019
New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.